

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 28, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2013AP2605  
2013AP2765  
STATE OF WISCONSIN**

**Cir. Ct. No. 2013CV444**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**GREAT-WEST LIFE & ANNUITY INSURANCE CO. AND BOTTOLOFSON  
1997 TRUST, BY FIRST FINANCIAL TRUST, N.A., TRUSTEE,**

**PETITIONERS-RESPONDENTS-CROSS-APPELLANTS,**

**V.**

**WISCONSIN DEPARTMENT OF REVENUE,**

**RESPONDENT-APPELLANT-CROSS-RESPONDENT.**

---

**GREAT-WEST LIFE & ANNUITY INSURANCE CO. AND  
BOTTOLOFSON 1997 TRUST, BY FIRST FINANCIAL TRUST N.A.,  
TRUSTEE,**

**PETITIONERS-APPELLANTS,**

**V.**

**WISCONSIN DEPARTMENT OF REVENUE,**

**RESPONDENT-RESPONDENT.**

---

APPEALS and CROSS-APPEAL from orders of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Reversed; cross-appeal dismissed.*

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Donald Bottolfson won the Wisconsin “Megabucks” lottery (the “prize money”) in 1994. The primary issue in this case is whether the Wisconsin Tax Appeals Commission properly denied the request of Great-West Life & Annuity Insurance Co. to refund money withheld by the Wisconsin Department of Revenue (DOR) from prize money payments made to a trust, the Bottolfson 1997 Trust, which was created to receive the prize payments.<sup>1</sup> DOR withheld the money because of back taxes owed by Bottolfson, who at the time the money was withheld, was a beneficiary of the Trust. For reasons that will become clearer below, to resolve this issue requires us to determine whether Bottolfson’s sale to Great-West of the income stream Bottolfson would have received from the Trust constitutes an assignment in violation of WIS. STAT. § 565.30(6) (1997-98).<sup>2</sup> If we conclude that the sale of the income stream violates sub. (6), we must determine whether DOR is equitably estopped from objecting to the assignment.

---

<sup>1</sup> The Trust is also a named party to this action. For ease of reference, we refer to Great-West and the Trust collectively as “Great-West.”

<sup>2</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶2 For the reasons that follow, we conclude that Bottolfson's sale of the income stream constitutes an assignment of the right to a lottery prize in violation of WIS. STAT. § 565.30(6), and, turning to Great West's alternative argument, further conclude that DOR is not equitably estopped from objecting to the assignment. Accordingly, we reverse the circuit court and affirm the commission.

¶3 Separately, Great-West seeks attorney fees and costs pursuant to WIS. STAT. § 227.483(1) and (3)(b), on the ground that Great-West's defense of its withholding of the lottery prize payments to the Trust were and continue to be frivolous. Great-West also seeks a court order granting Great-West statutory interest at the rate of five percent, pursuant to WIS. STAT. § 138.04. In its final decision on both topics, the circuit court remanded these issues to be decided by the commission. Great-West cross-appeals the circuit court's order remanding both issues to the commission. Because DOR prevails on this appeal, it is obvious that this appeal is not frivolous and that, as the losing party, Great-West is not entitled to any attorney fees and costs, or statutory interest. Thus, we dismiss Great-West's cross-appeal.

## **BACKGROUND**

¶4 In 1994, Bottolfson won \$9,768,197.74 in the Wisconsin Lottery and opted for twenty-five annual payments commencing September 1994 and ending in 2018.

¶5 In 1997, Bottolfson's ex-wife, Barbara, filed a lawsuit against Bottolfson in the Polk County circuit court, alleging that she was entitled to receive part of Bottolfson's annual payments. The underlying dispute in that litigation does not matter here. What does matter is that Bottolfson settled the lawsuit by agreeing to the creation of a trust which would receive the prize

payments. Following the settlement agreement, the circuit court entered an order approving the creation and the terms of the Trust. The Wisconsin Lottery, as a division of DOR, agreed to the creation of the Trust and to pay Bottolfson's future payments of the prize to the Trust.

¶6 At the same time in 1997 and separate from the creation of the Trust, Bottolfson sold the income stream he would have received from the Trust for a lump-sum payment from Great-West.<sup>3</sup> For approximately three years, DOR paid Bottolfson's annual prize money to the Trust and in turn the Trust paid the same prize money to Great-West.

¶7 In 2001, DOR withheld a total of \$428,943.01 of the prize money to the Trust to satisfy back taxes owed by Bottolfson. In 2005, Great-West filed a claim with DOR seeking a refund of the \$428,943.01 withheld from the Trust. DOR denied the refund. Great-West appealed to the commission.

¶8 The commission concluded that DOR properly denied Great-West's refund claims because the sale to Great-West was "unquestionably an assignment, and at that time was prohibited by WIS. STAT. § 565.30(6)," which prohibited the assignment of a person's right to a lottery prize; therefore, Bottolfson continued to own the prize money and DOR could withhold the back taxes. The commission also rejected Great-West's argument that DOR should be equitably estopped from pursuing its claim because, according to Great-West, DOR acquiesced to the creation and the terms of the Trust. Accordingly, the commission granted summary judgment in favor of DOR.

---

<sup>3</sup> The initial sale was to Stone Street Capital, Great-West's predecessor in interest with respect to the Trust. For ease of discussion we refer only to Great-West.

¶9 Great-West sought judicial review and the circuit court reversed the commission's decision. DOR appeals. Great-West cross-appeals seeking costs, attorney fees, and a determination that a five percent interest rate applies to the funds it seeks on appeal.

¶10 We held oral argument on this case. During oral argument, DOR agreed that the dispositive issues in this case are: whether Bottolfson's sale to Great-West of the income stream he would have received from the Trust violates WIS. STAT. § 565.30(6); and, in the alternative, whether the commission properly rejected Great-West's argument that DOR is equitably estopped from denying the validity of the sale. We address those issues in the following manner.

¶11 We first discuss the general prohibition against assignments in WIS. STAT. § 565.30(6), and the limited exceptions to that general prohibition. We then discuss Great-West's theory that Bottolfson's sale of the income stream to Great-West is permissible under general principles of trust and estate law. Finally, we discuss Great-West's equitable estoppel argument. As we have already explained, because DOR prevails on this appeal, the dismissal of Great-West's cross-appeal is required and we discuss that topic no further.

## DISCUSSION

¶12 DOR seeks judicial review of a decision by the circuit court reversing the commission's decision in this case in favor of DOR. We review the commission's decision, rather than the circuit court's. *DOR v. Menasha Corp.*, 2008 WI 88, ¶46, 311 Wis. 2d 579, 754 N.W.2d 95. The parties disagree as to the level of deference we should afford the commission. We need not decide the issue because DOR prevails regardless of the degree of deference we afford the commission's decision.

- I. Bottolfson's sale of the income stream from the Trust violates WIS. STAT. § 565.30(6).

¶13 The parties dispute whether DOR properly withheld back taxes from prize money payments made to the Trust. The resolution of this dispute hinges on whether Bottolfson's sale of the income stream to Great-West violates WIS. STAT. § 565.30(6). We conclude that it does.

- ¶14 WISCONSIN STATS. § 565.30, states in pertinent part:

(1) PAYMENT OF PRIZES. The administrator shall direct the payment of a prize to the holder of the winning lottery ticket or lottery share or to a person designated under sub. (2), *except that a prize may be paid to another person under a court order* or to the estate of a deceased prize winner. The department, administrator, state and any contractor for materials, equipment or services of the game in which the prize is won are discharged of all liability upon payment of the prize to the holder of a winning lottery ticket or lottery share.

....

(6) NONASSIGNABILITY. The right of any person to a prize may not be assigned.

¶15 As we said above, the parties agree that the Polk County circuit court order creating the Trust and ordering that the prize money be paid to the Trust was valid under WIS. STAT. § 565.30(1). What the parties dispute is whether Bottolfson's sale to Great-West of the income stream from the Trust runs afoul of § 565.30(6). We conclude, applying a plain language interpretation of § 565.30, that the assignment was impermissible under § 565.30(6).

¶16 WISCONSIN STAT. § 565.30(6) imposes a blanket prohibition on assigning a lottery winner's right to a lottery prize to a third party, except under

the limited circumstances specified in § 565.30(1)-(5).<sup>4</sup> In other words, the statutory scheme is structured such that § 565.30(6) operates as a general rule prohibiting the assignment of prize money to a third party, and § 565.30(1)-(5) sets forth the limited exceptions. The use of a trust as a vehicle for assigning a lottery prize to a third party, such as Great-West, is not one of the listed exceptions and Great-West does not argue otherwise. Thus, under this statutory scheme, Bottolfson's sale to Great-West of the income stream from the Trust is prohibited under § 565.30(6). See *Caflish v. Staum*, 2000 WI App 113, ¶13, 235 Wis. 2d 210, 612 N.W.2d 385 ("When the legislature provides a finite list of exceptions to a general rule, we presume that the legislature did not intend other exceptions.").

¶17 Rather than challenge the plain meaning of WIS. STAT. § 565.30, Great-West argues that § 565.30(6) does not apply here for two reasons. First, according to Great-West, once the prize was assigned to the Trust, the prize money that the Lottery paid into the Trust converted to a beneficial trust interest that Bottolfson was free to sell under the common law principle that trust interests are freely alienable. Second, Great-West asserts that § 565.30(6) does not include any language that specifically abrogates this common law right and, therefore, Bottolfson's sale of the income stream he would have received from the Trust did not violate § 565.30(6). We are not persuaded. Interpreting the sale to Great-West of Bottolfson's income stream as a lawful alienation of a beneficiary interest would substantially defeat the legislature's broad prohibition in the statute against

---

<sup>4</sup> The enumerated exceptions in WIS. STAT. § 565.30 are: (1) "a prize may be paid to another person under court order"; (2) "payment of the prize by delivering to an adult member of [a] minor's family"; (3) "withholding of delinquent state taxes, child support or debts owed to the state"; (4) "withholding of child support, spousal support, maintenance or family support"; and (5) "withholding of assessments, fines, restitution and surcharges." (Alteration in original.)

assignment. If the legislative prohibition could be so easily side-stepped, it would have no force.

¶18 Great-West points to *Salkin v. Stone Street Capital, Inc.*, 297 B.R. 279 (Bankr. S.D. Fla. 2003), and urges us to adopt the federal bankruptcy court’s rationale in that case. In *Salkin*, the court held that the beneficiary’s sale of the income stream from a lottery prize that he would have received from a trust did not violate the Florida statute prohibiting the assignment of a lottery prize, because the statute abrogated the common law principle of the free alienation of a beneficiary’s trust interest. *Salkin*, 297 B.R. at 281. We do not accept Great-West’s invitation to follow the court’s rationale in *Salkin*. First, we are not bound by this federal bankruptcy court’s decision. Second, the rationale used in *Salkin* fails to account for the principle, recognized in a persuasive treatise, that, “[i]n the absence of ... a statute to the contrary” a beneficiary may alienate his trust interest freely. GEORGE T. BOGERT, LAW OF TRUSTS AND TRUSTEES § 188 (2015) (emphasis added).

¶19 Based on the foregoing reasons, we conclude that Bottolfson’s sale to Great-West of the income stream he would have received from the Trust constitutes an assignment in violation of WIS. STAT. § 565.30(6). Therefore, Bottolfson continued to own the prize for the purposes of tax liability and the commission properly affirmed DOR’s denial of the refund.

## II. DOR is not equitably estopped from pursuing its claim

¶20 Great-West contends that DOR is estopped from denying the validity of Bottolfson’s assignment of the prize money to the Trust because DOR co-authored, approved, and honored the Polk County judgment requiring Bottolfson to assign the prize to the Trust.



¶21 Great-West contends that the undisputed material facts establish all the elements of estoppel. Great-West argues that: (1) DOR took action by co-authoring and approving the assignment of Bottolfson's prize to the Trust; (2) DOR's actions induced reliance by Great-West in purchasing Bottolfson's interest in the prize assigned to the Trust; and (3) Great-West suffered a detriment because it paid for the assignment of interest in the Trust and DOR withheld approximately \$430,000 from the Trust. *See Dawson v. Town of Jackson*, 2010 WI App 24, ¶12, 323 Wis. 2d 477, 780 N.W.2d 222, *rev'd on other grounds*, 2011 WI 77, 336 Wis. 2d 318, 801 N.W.2d 316.

¶22 DOR argues that no reliance by Great-West could have come from DOR's actions because the evidence shows that DOR never indicated its approval of Bottolfson's sale to Great-West or otherwise indicated that Bottolfson had the right to assign his right to proceeds from the Trust. We agree with DOR.

¶23 Great-West's arguments are flawed. Great-West is not arguing that DOR indicated its approval of the idea that Bottolfson could sell to Great-West the income stream he would have received from the Trust, which as discussed above, is the assignment DOR is challenging on appeal. Instead, Great-West argues that DOR's approval of the Trust at the time the Trust was created is the action Great-West relied on to purchase the income stream Bottolfson would have received from the Trust. According to Great-West, if DOR's argument is that WIS. STAT. § 565.30(6) prohibits Bottolfson from selling to Great-West the income stream he would have received from the Trust, DOR should be estopped from advancing that very argument because it was reasonable for Great-West to think otherwise. That is, it was reasonable for Great-West to think that the creation of the Trust would render Bottolfson's income stream from the Trust freely alienable. Great-West

asserts that it would not have purchased Bottolfson's income stream from the Trust had DOR not agreed to the creation of the Trust.

¶24 Great-West's arguments miss the mark. As noted above, Great-West points only to DOR's role in the *creation* of the Trust, which does not directly involve the assignment at issue on appeal. Simply participating in the creation of the Trust, which does not conflict with WIS. STAT. § 565.30(6), does not indicate DOR's approval of an action that Bottolfson, as the beneficiary, might take that does conflict with § 565.30(6). Great-West does not argue that DOR indicated its approval of this separate action. Neither does Great-West point to any evidence that DOR misled Great-West regarding DOR's opinion of the propriety of Bottolfson's sale of the income stream from the Trust. In sum, it would have been unreasonable for Great-West to rely on DOR's role in the creation of the Trust as indicating DOR's approval of the propriety of Bottolfson selling his income stream.

¶25 Not only would it have been unreasonable for Great-West to rely on DOR's role in the creation of the Trust when it purchased Bottolfson's income stream, there is reason to doubt that Great-West did in fact act with such reliance. According to the summary judgment record before the commission, Great-West sought and received legal advice from in-house counsel and outside counsel that the purchase of Bottolfson's income stream was not limited by WIS. STAT. § 565.30(6). That is, the record indicates that Great-West relied on outside and in-house counsel, not DOR, in deciding to purchase the income stream.

## CONCLUSION

¶26 For the foregoing reasons, we conclude that the commission correctly rejected Great-West's petition for a refund of money withheld from the

prize money payments to the Trust. Accordingly, we reverse the circuit court and affirm the commission's denial of Great-West's demand for a refund of that money. As for Great-West's cross-appeal, because DOR prevails on this appeal, the dismissal of Great-West's cross-appeal is required.

*By the Court.*—Orders reversed; cross-appeal dismissed.

Not recommended for publication in the official reports.

